

No. 2683

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation),
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR
and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

IRA A. CAMPBELL,
Attorney for Plaintiffs in Error.

Filed this.....day of March, 1916. MAR 13 1916

FRANK D. MONCKTON, Clerk. F. D. Monckton, Clerk

By.....Deputy Clerk.

Table of Authorities.

	Pages
<i>Allen-West Comm. Co. v. Patillo</i> , 90 Fed. 628.....	21
<i>Barlow v. Scott</i> , 24 N. Y. 40.....	19
<i>Brent v. Chas. H. Lilly Co.</i> , 174 Fed. 877.....	20
<i>Cavazos v. Trevino</i> , 73 U. S. 773; 18 L. Ed. 813.....	25
<i>Central Pac. Ry. Co. v. United States</i> , 28 Ct. Cl. 427.....	19
<i>Central Trust Co. v. Wabash, St. L. & P. Ry. Co.</i> , 34 Fed. 254, 258	21
<i>Cyc.</i> , Vol. 9, page 590.....	16
<i>Cyc.</i> , Vol. 9, page 587.....	23
<i>Gantz v. Dist. of Columbia</i> , 18 Ct. Cl. 569.....	16, 17
<i>Garrison v. United States</i> , 7 Wall. 688; 19 L. Ed. 277..	17
<i>Hoffman v. Aetna F. Ins. Co.</i> , 32 N. Y. 405, 413.....	19
<i>Merriam v. United States</i> , 107 U. S. 437; 27 L. Ed. 531..	23
<i>Noonan v. Bradley</i> , 9 Wall. 394; 19 L. Ed. 757.....	16
<i>Otis v. United States</i> , 20 Ct. Cl. 315.....	16, 17
<i>Page on Contracts</i> , Vol. 2, Sec. 1127, p. 1752.....	19
<i>Phoenix Ins. Co. v. Slaughter</i> , 12 Wall. 404; 20 L. Ed. 444	16
<i>Reed v. Merchants Mutual Ins. Co.</i> , 95 U. S. 23; 24 L. Ed. 348	23
<i>Scully v. United States</i> , 197 Fed. 327.....	17, 20
<i>S. H. Hawes & Co. v. Wm. R. Trigg Co.</i> , 65 S. E. 538, 549	31
<i>Simpson v. United States</i> , 31 Ct. Cl. 217, 243.....	17
<i>Smoot's Case</i> , 15 Wall. 36; 21 L. Ed. 107.....	30
<i>Turner v. Meridian F. Ins. Co.</i> , 16 Fed. 454.....	16
<i>United States v. Newport News Shipbuilding & Dry Dock Co.</i> , 178 Fed. 194.....	16, 30
<i>United States v. R. P. Andrews & Co.</i> , 207 U. S. 229; 52 L. Ed. 185.....	26

Table of Contents.

	Pages
I. STATEMENT OF THE CASE.....	1 - 9
II. ASSIGNMENT OF ERRORS.....	9 - 10
III. BRIEF OF THE ARGUMENT.....	10 - 32
Outline of Points to be Made.....	10 - 12
A. <i>On its Face the Telegram of Sept. 12, 1911, was an Express Written Offer to Extend the Charter</i>	12 - 15
(a) The offer was to extend the option on terms mentioned in paragraph 21 of the charter, which provided for an option which could only exist while the charter survived	12 - 14
(b) By the phrase "otherwise charter to terminate," the Department clearly said that if the option were extended the charter was not to terminate.....	14 - 15
B. <i>If the Wording of the Telegram was Ambiguous, Nevertheless it Appears Conclusively that it was Intended as an Offer to Extend the Charter</i>	15 - 32
(a) If the ambiguity existed, then the telegram must be construed as an offer to extend the charter, because the Department drew it. The rule that where an instrument is ambiguous it is to be given the construction less favorable to the party employing the ambiguous language, has been held to apply to government contracts	16 - 18
(b) Even if the telegram was ambiguous, the Department knew which meaning was attached to it by plaintiffs in error, and is therefore bound to that construction	18 - 22

TABLE OF CONTENTS

iii

	Pages
(c) Assuming that the ambiguity existed, the true meaning should have been ascertained from all of the attendant facts. So viewed, the telegram was unquestionably an offer to extend the charter	23 - 30
(d) The same rule governs the construction of a contract between the United States government and a private individual as between two individuals.....	30 - 32

No. 2683

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. HOMER FRITCH, INCORPORATED (a corporation),
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR
and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

Statement of the Case.

For several years prior to 1911 the Department of Commerce and Labor had chartered from plaintiffs in error their steamer, the "Homer". The Bureau of Fisheries of that Department had used the "Homer" in connection with the Alaska Seal Fisheries, sending her on trips to the Fisheries Station on the Pribilof Islands, and had so used her during from three to four months in the summer of each year (tr. p. 54).

The "Homer" was well suited to the needs of the Department, and ultimately those who had the affairs of the Department in hand recognized the economy and advantage of purchasing her (tr. p. 56). Among these were George M. Bowers, the Commissioner of Fisheries, and W. I. Lembkey, the Agent of the Department of Commerce and Labor for the Alaska Seal Fisheries (tr. p. 54).

Accordingly, in the fall of 1910, when the matter of arranging for the services of the "Homer" for the summer months of 1911 was taken up, considerable correspondence passed between the parties in which the subject of the purchase of the "Homer" by the Department was discussed (tr. pp. 56-78). These negotiations failed because the Department, while it had on hand a fund of \$20,000, which was available for the purchase outright of the "Homer", and other funds which could be used for its charter, was not in a position to pay the full price asked by the owners (tr. p. 72). The negotiations led, however, to the insertion in the charter party for 1911, of a clause permitting the Department "*at any time during the charter*" to purchase the "Homer" for \$45,000, and to apply upon account of the purchase price the amount paid as charter hire during the summer of 1911 (tr. pp. 75-78).

On December 2, 1910, in the course of the correspondence referred to, Lembkey wrote to J. Homer Fritch, who represented the plaintiffs in error in all of these transactions:

“DEPARTMENT OF COMMERCE AND LABOR.
Bureau of Fisheries.
Washington.

Personal.

December 2, 1910.

My dear Mr. Fritch.

“Your letter of November 23, regarding the purchase of the ‘Homer’ is to hand. The Commissioner wished me to write you a personal letter about the matter.

“The Commissioner desires to purchase the ‘Homer’. The terms of purchase, however, require some adjustment. The situation is about as follows, and, as a business man, you will readily grasp it:

“The appropriation, of which we have an unexpended balance this year and from which the purchase of the vessel was contemplated, has been decided to be not available for purchase of a vessel, although it can be used for chartering. We have, however, another appropriation of \$20,000, which can be used for purchase outright of a vessel for Alaska. The object, therefore, if a vessel should be purchased, is to pay the \$20,000 down as part payment of the purchase money, and to have the balance of the latter paid as charter money from the other appropriation.

“If we were to charter the ‘Homer’ this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the balance of the purchase price.

* * * * *

Very truly yours,

(Signed) W. I. LEMBKEY.”

(Tr. p. 64.)

Again, on December 15, 1910, Lembkey wrote:

“DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries.

Personal. December 15, 1910, Washington.

My dear Mr. Fritch:

“I beg to acknowledge the receipt yesterday of your letter of the 8th instant, in which you state that the idea conveyed in my personal letter of the 2d instant, regarding the purchase of the ‘Homer’, is favorably received.

“I must state frankly that, at first, I partially misunderstood the Commissioner’s idea regarding the arrangements for purchase. It is his desire to make a charter in the usual way as though the question of sale were not under discussion; to allow the charter-money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for \$20,000, he would proceed to do so. This is the same proposition as contained in my former letter, except that the payment of the \$20,000 occurs at the latter end of the transaction instead of at the beginning. I hope this will make no difference in your calculations.

* * * * *

Very truly yours,

(Signed) W. I. LEMBKEY.”

(Tr. p. 67.)

The charter for 1911 was entered into on April 24, 1911 (tr. p. 17). It contained the option clause as already outlined (tr. p. 23). The Department took the vessel on May 15, 1911 (tr. p. 25). It had returned from its second voyage to the Pribilof Islands and was ready to be turned over to its owners at noon on September 12, 1911 (tr. pp. 25, 28, 83). But on the morning of

September 12, 1911, the Department sent plaintiffs in error a telegram (tr. pp. 26, 39, 43, 83).

The question in this case is whether this telegram contemplated that the charter should be extended with the option, or that the option should be extended but that the charter should terminate. Plaintiffs in error contend that it was an offer to extend the charter, (1) on its face; (2) in view of all of the circumstances under which it was sent, in view of what had gone before, and in view of the subsequent actions of the Department under it. The Government claimed that it was an offer to extend the option only.

The telegram was as follows:

“Washington, D. C., Sept. 12, 1911. 10:07 A. M.
J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,

Acting Secretary.”

(Tr. p. 26.)

After the receipt of this telegram what occurred was precisely in accord with Lembkey's letter of December 2, 1910. The “Homer” was laid up in Oakland Creek, and there remained for more than thirty days (tr. p. 88).

On September 14, 1911, the Department was advised that *the charter* had been extended. It received from plaintiffs the following telegram:

“San Francisco, Sept. 14, 1911.

“Acting Secretary,

Dept. of Commerce & Labor,

Washington, D. C.

“As requested in your telegram of twelfth instant charter steamer ‘Homer’ hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.”

(Tr. pp. 27, 84, 86.)

The Department made no reply to this telegram.

On October 10, 1911, the Department received the following telegram from plaintiffs:

“San Francisco, Oct. 10, 1911.

George M. Bowers,

Commissioner of Fisheries,

Dep’t of Commerce & Labor,

Washington, D. C.

Your extension of charter and option of Steamer ‘Homer’ expires October 13th. Should this expire without further action on the part of the department ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises.

J. HOMER FRITCH.”

(Tr. p. 28.)

The Department’s reply to this telegram was as follows:

“Washington, D. C., Oct. 12-11.

J. Homer Fritch, Inc.,

Fife Bldg., Sanfran.

Replying yours Oct. ten Bureau of Fisheries is not in position to purchase Homer.

I. H. DUNLAP,

Actg. Commr.”

(Tr. p. 29.)

The first intimation of the Department's position came to plaintiffs two weeks after the expiration of the term of the extension. About November 1, 1911, plaintiffs received the following letter, dated October 25, 1911:

“Washington, October 25, 1911.

Mr. J. Homer Fritch,
110 East Street,
San Francisco, Cal.

Sir:

Replying to your letter of the 14th instant, inclosing duplicate bills for charter of the steamship ‘Homer’ from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time.

Respectfully,
(Sgd.) BEN J. CABLE,
Acting Secretary.”

(Tr. p. 30.)

On September 13, 1911, Lembkey, being at the time in San Francisco and having been shown the Department's telegram of September 12th, endorsed the following upon the owners' duplicate of the charter:

“According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

“Subject to approval of Dept. of Commerce & Labor.

W. I. LEMBKEY,
Agent Seal Fisheries.”

(Tr. pp. 26-27; 46; 85-86.)

Plaintiffs in error contend that the true meaning of the telegram of the 12th and the meaning of that telegram in legal contemplation was to offer to extend the charter. By its express, its literal, terms, it was such an offer.

If, however, it be held that it had on its face two possible meanings, then, for several distinct reasons, the court erred in refusing to hold that it was intended as an offer to extend the charter as well as the option. Its language was prepared by the Department. Therefore, under the familiar rule that where an ambiguity appears in a contract, the contract will be given that meaning which is less favorable to the party drawing it, the telegram must be construed not as an offer to extend the option alone, but to extend the charter as well. Again, it must be so construed under the rule that where the language of a contract is ambiguous and one party has notice that the other places a certain construction upon it and does not object, the former will be bound by such construction. This rule applies with full force in this case because by the telegram of September 14th, and again by the telegram of October 10th, the Department was expressly notified that plaintiffs in error so construed the telegram of September 12th. Finally, if the ambiguity existed, then it became the duty of the court to determine the true and intended meaning of the telegram of the 12th in view of all the surrounding facts. As to this, the undisputed evidence of the events leading up to the sending of the telegram, the attendant circumstances, and the contemporaneous and subsequent understanding of the

parties pointed irresistibly to the conclusion that it was intended as an offer to extend the charter as well as the option. There was not a single fact or a single word of testimony tending to establish the contrary.

The case was tried in the District Court without a jury. An agreed statement was filed. Additional proof was offered by plaintiffs to show independently (in the event that the court should hold that there was ambiguity in the telegram of the 12th) that both parties intended an extension of the charter as well as the option. Some of this proof was ruled out as immaterial; the rest was discarded by the court in the making of special findings, and in each instance plaintiffs in error requested that the fact be found, and excepted to the court's refusal.

There were two counts. Plaintiffs had judgment for \$1462.75 on count 1, being the charter hire admittedly due and unpaid from September 1st to 12th, 1911. The second count was for \$4488.75, and rested on the thirty-day extension. Plaintiffs bring the writ of error to reverse the judgment of the District Court denying them a recovery upon their second count.

II.

Assignment of Errors.

Two main points are covered by the assignments:

First, that *on its face* the telegram of September 12, 1911, constituted an offer to extend the charter with the option (Assignments 1, 2, 3, 4, 5, 6, and 10);

Second, that the telegram of September 12, 1911, in view of all the facts and evidence, constituted an offer to extend the charter as well as the option (Assignments 7, 8, 11).

Other assignments under this point are to rulings of the court respecting evidence which plaintiffs offered of facts tending to show that, in the event that the court held that the telegram of September 12, 1911, was ambiguous, its true meaning, as it was intended by the sender, was to offer to extend the charter as well as the option (Assignments 15 to 32, inclusive). Still other assignments under this general heading relate to exceptions by plaintiffs in error to the trial court's refusal to specially find facts established without contradiction by the evidence, which tended to show that the telegram of September 12th, even if ambiguous on its face, was meant as an offer to extend the charter, and not the option alone (Assignments 33 to 48, inclusive).

III.

Brief of the Argument.

The argument for plaintiffs in error will take the following course:

- (A) *On its face the telegram of September 12, 1911, was an express written offer to extend the charter.*

(a) The offer was to extend the option “upon terms mentioned in paragraph 21 of the charter.” Paragraph 21 of the charter gave the right to purchase only during the life of the charter.

(b) The language of the telegram “otherwise charter to terminate” clearly meant that if the offer was accepted the charter should continue.

(B) *If there was an ambiguity in the telegram of September 12, 1911, nevertheless the court should have held that it was intended to extend the charter.*

(a) If the ambiguity existed, then the telegram must be construed as an offer to extend the charter, under the rule that an instrument which has two possible meanings will be given that meaning which is less favorable to the party drawing it. The Department of Commerce and Labor drew the telegram, and it is settled that this rule of construction may be invoked in interpreting a government contract.

(b) Even if the telegram of the 12th was ambiguous and had two possible meanings, it is not disputed that the Department was advised by the telegram of the 14th of the construction which plaintiffs in error placed upon it, and not having objected thereto, it was bound by such construction.

- (c) Assuming that the ambiguity existed, the true meaning should have been ascertained from all of the attendant facts. So viewed, the telegram was unquestionably an offer to extend the charter.
- (d) The same rules should govern the construction of a contract between the United States government and a private individual as one between two individuals.

A.

ON ITS FACE THE TELEGRAM OF SEPTEMBER 12, 1911, WAS AN EXPRESS WRITTEN OFFER TO EXTEND THE CHARTER.

- (a) The offer was to extend the option on terms mentioned in paragraph 21 of the charter, which provided for an option which could only exist while the charter survived.

The telegram of September 12, 1911, read:

“10:07 A. M.

Washington, D. C. Sept. 12-1911.

J. Homer Fritch, Inc.,
San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,
Acting Secretary.”

(Tr. p. 26.)

The option referred to contained in paragraph 21 of the charter read:

“21. That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.00) Dollars against which any amount paid for the hire of the said vessel less cost of operation shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of sale.”

(Tr. p. 23.)

Paragraph 21 of the charter is expressly referred to in the telegram. It therefore became a part of the offer which the Department placed before plaintiffs.

The telegram particularly asked an extension of the option “on terms mentioned in paragraph 21 of charter”. One of the terms of paragraph 21 of the charter (and a most important one) was that the charterers might purchase “at any time during this charter”. This was one of the terms, therefore, on which the extension of the option was asked.

The charter provided that the charterers should be entitled to set off and deduct any amount paid as charter hire against the agreed price. This right was of substantial benefit to the Government, but it could hardly be expected to outlive the charter. In other words, the charterers could not fairly expect to stop paying hire and still exercise such a privilege. That it was not in the original contemplation of the parties is apparent from the stipulation that the option might be exercised “at any time during this charter”. And that the Department did not really mean to ask such a privilege is made certain, for it asked a continuation

of what the charter, and particularly paragraph 21 thereof, gave it, and nothing more.

The Department asked the extension of an option which, by the terms of the instrument granting it, depended for its continued existence upon the co-existence of the charter. In so doing, it in effect asked that the charter be extended, and that the Department be permitted to use the moneys which it might pay on account of hire, in part payment of the purchase price.

(b) By the phrase "otherwise charter to terminate", the Department clearly said that if the option were extended the charter was not to terminate.

We are now considering the meaning of the telegram solely from the meaning of the words themselves. Later, we shall ask the court that, if necessary, it look at all of the circumstances under which this telegram was sent and determine its meaning in the light of those circumstances.

We submit, however, that in view of this concluding phrase of the telegram, plaintiffs should have recovered.

The proposition is a simple one. The word "otherwise" so used can have but one meaning. A chartered his boat to B, and in his charter gives B the right to purchase the boat "at any time during the charter" and to set off the hire paid against the purchase price. As the charter is about to expire, B says to A: "I want an extension of that option on the terms mentioned in our charter, *otherwise* the charter is to terminate". It is submitted that such language plainly

says: "If you don't grant the option the charter ends; if you do grant the option, *the charter is extended*".

B.

**IF THE WORDING OF THE TELEGRAM WAS AMBIGUOUS
NEVERTHELESS IT APPEARS CONCLUSIVELY THAT IT WAS
INTENDED AS AN OFFER TO EXTEND THE CHARTER.**

Our first contention is that the telegram of September 12, 1911, was by its terms an express offer to extend *the charter with the option*.

But if the telegram was capable of two possible meanings, that is, if it might be read as either an offer to extend *the charter with the option*, or *the option alone*, then it was ambiguous, and no more. If ambiguous in this respect, then we contend:

- (a) That the Department having drawn the telegram, that construction is to be given it which is less favorable to the United States;
- (b) That the Department, having remained silent after being advised of the construction put upon the telegram by plaintiffs in error, is bound by that construction;
- (c) That all of the evidence showed that the parties intended to extend the charter, and not the option alone;
- (d) That the same rules of construction apply to contracts between the government and individuals as between private individuals.

- (a) If the ambiguity existed, then the telegram must be construed as an offer to extend the charter, because the Department drew it. The rule, that where an instrument is ambiguous it is to be given the construction less favorable to the party employing the ambiguous language, has been held to apply to government contracts.

We invoke a settled rule of construction—9 *Cyc.* 590:

“It is a well-settled rule of construction that words will be construed most strongly against the party who used them; the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.”

Phoenix Insurance Co. v. Slaughter, 12 Wall.

404; 20 L. Ed. 444;

Noonan v. Bradley, 9 Wall. 394; 19 L. Ed. 757;

Turner v. Meridian F. Ins. Co., 16 Fed. 454;

Otis v. United States, 20 Ct. Cl. 315;

Gantz v. Dist. of Columbia, 18 Ct. Cl. 569.

It has been held by the Fourth Circuit that this rule may be invoked against a Department of the Government.

United States v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194:

“The rule that a contract is to be construed most strongly against the party who prepares it applies to the United States with respect to its contracts with private parties.”

The same rule was applied in

Scully v. United States, 197 Fed. 327, 343,

Judge Farrington saying:

“The rule that a contract is to be construed most strongly against the party preparing it applies to the government in a case like this, as well as to an individual.”

The case referred to arose out of an ambiguity existing in a contract between a surveyor and the Surveyor-General of the United States, the contract having been prepared by the latter.

The United States Supreme Court applied the same rule against the government in construing an ambiguous clause in a contract for the purchase of arms in

Garrison v. United States, 7 Wall. 688; 19 L. Ed. 277.

Mr. Justice Miller said:

“The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expressions should, therefore, according to a well known rule, be construed most strongly against the party who uses the language.”

See also

Simpson v. United States, 31 Ct. Cl. 217, 243;

Otis v. United States, *supra*;

Gantz v. Dist. of Columbia, *supra*.

The telegram of September 12, 1911, was drawn and sent by the Department of Commerce and Labor. That Department employed the language out of which the alleged ambiguity arose. We see no possible escape

from the application of the rule established in the cases just noted.

- (b) Even if the telegram was ambiguous, the Department knew which meaning was attached to it by plaintiffs in error, and is therefore bound to that construction.

It is stipulated that on September 14, 1911, the Department actually *received* from plaintiffs in error the following telegram:

“San Francisco, Sept. 14, 1911.

Acting Secretary,

Dept. of Commerce & Labor,

Washington, D. C.

As requested in your telegram of twelfth instant charter steamer ‘Homer’ hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.”

Nevertheless, the Department did not utter a word to the effect that this was an incorrect interpretation of its telegram of the 12th until two weeks after the expiration of the thirty days. Even when plaintiffs in error wired it on October 10, 1911, that “your extension of *charter* and option of steamer Homer expires October thirteenth” (tr. p. 28), it did not dissent, but replied simply, “Replying yours October tenth Bureau of Fisheries is not in position to purchase Homer”.

These facts bring the case squarely within a rule settled by the authorities, namely, that where a contract is ambiguous and capable of more than one

meaning, a party will be held to that meaning which he knows the other party has placed upon it.

2 Page on Contracts, Sec. 1127, p. 1752:

“If a promise is so ambiguous as to be susceptible of more than one interpretation and the promisor knows which of these possible meanings the promisee attaches to the promise, that meaning will be adopted by the court in construing the contract. The same rule applies where the promisor has reason to suppose that the promisee understands the ambiguous promise in a particular sense.”

Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 405, 413:

“It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee.”

Barlow v. Scott, 24 N. Y. 40:

“A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it.”

And here again we find that the federal courts have applied the general rule of construction against the government in determining the meaning of its contracts with individuals.

In

Central Pac. Ry. Co. v. United States, 28 Ct. Cl. 427,

the Court of Claims held:

“A construction given to a contract by the express declaration of one party and the silent acquiescence of the other, prior to and during the

performance of a service, cannot be repudiated after a party has acted upon the faith of it."

In

Scully v. United States (supra), 197 Fed. 327, 343,

Judge Farrington said:

"It is a well established principle, that when there is a doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear."

Particularly in point is the case of

Brent v. Chas. H. Lilly Co., 174 Fed. 877.

The question was whether the word "bushel" used in a contract meant fourteen pounds. In holding that it did, Judge Donworth, speaking for the Circuit Court in Washington, said:

"There can be no question but that the plaintiff at all times understood the contract to call for 14 pounds to the bushel. The contrary is not seriously contended by defendant. Now in his letter of June 27th to the defendant (Plaintiff's Exhibit E) plaintiff expressly defined a bushel as being 14 pounds; and, while defendant acknowledged the receipt of this on July 2d (Exhibit F), and corrected plaintiff's understanding of the contract in other respects, it made no objection to, or criticism of, this feature of plaintiff's letter. Conceding that defendant was not bound by any notice of the custom defining a bushel as 14 pounds in first placing its order, it was fully informed of plaintiff's understanding to that effect when it received plaintiff's letter of June 27th. * * *

A similar application of the rule is found in

Allen-West Commission Co. v. Patillo, 90 Fed.
628,

where it was held:

“Where plaintiff, who was making advances to defendant, advised him by letters and by statements, from time to time, of the contract under which such advances were made, as he understood it, the defendant could not remain silent, and obtain future advances, without dissenting from such understanding, and afterwards deny the existence of the contract.”

This rule does not rest on any theory of estoppel, so as to prevent its being invoked against the government. This was pointed out in

Central Trust Co. v. Wabash, St. L. & P. Ry. Co.,
34 Fed. 254, 258,

where Judge Thayer said, in holding that a party to an ambiguous contract would be held to that interpretation which was consistent with its subsequent course of conduct under it:

“We do not hold that the conduct of the St. Louis, Kansas City & Northern Railroad and its successors in paying mileage creates an estoppel against it and its successors, but we do hold that the interpretation so put upon the agreement should determine its true construction, unless it is at variance with the express provisions of the instrument, which in this instances does not appear to us to be the case.”

It is submitted that the authorities cited under this heading are conclusive of the case. It is a conceded fact that the Department knew on September 14, 1911,

that its telegram of the 12th had been interpreted by plaintiffs in error as an offer to extend *the charter*. It is and must be conceded that the telegram was at least capable of such a construction. The Department did not say a word to indicate to plaintiffs in error that they were mistaken in their reading of the telegram until long after the thirty days had expired.

What explanation, we ask, have the representatives of the government to make for this implied assent of the Department? The good faith of plaintiffs in error is not denied. Evidence of such good faith was excluded by the trial court on the ground that it was not questioned (tr. pp. 49-50). It was not denied that plaintiff in error's vessel actually was held inactive and at the government's disposal for the full period of thirty days (tr. p. 88). No reason whatever is shown why the Department could not have advised plaintiffs in error of this mistake—if mistake it was. Nothing is presented to overcome the almost necessary conclusion from the facts that the Department's present interpretation of the telegram is an afterthought.

It would be strange if no legal barrier to so grossly unfair a course of conduct could be found.

We respectfully submit that the case is squarely within the rule invoked, and that, assuming that there is an ambiguity in the telegram of September 12th, the Department must be held to the construction which it knew plaintiffs in error had placed upon it—namely, that it was an offer to extend *the charter* as well as the option.

- (c) Assuming that the ambiguity existed, the true meaning should have been ascertained from all of the attendant facts. So viewed the telegram was unquestionably an offer to extend the charter.

Where an ambiguity exists in a contract its true meaning must be ascertained by a consideration of all of the attendant circumstances. The court must place itself so far as possible, in the situation of the parties, in order to determine what they intended by the ambiguous language.

9 Cyc., 587:

“To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible.”

Merriam v. United States, 107 U. S. 437; 27 L. Ed. 531:

“In the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.

* * *

“It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.”

In

Reed v. Merchants Mutual Ins. Co., 95 U. S. 23;
24 L. Ed. 348,

a clause in an insurance policy was found to be ambigu-

uous. The clause read "the risk to be suspended while vessel is at Baker's Island loading". The insurance company claimed that this meant "at any time while the vessel is at Baker's Island for the purpose of loading"; the insured claimed that it meant only while the vessel was actually engaged in loading.

In reaching a determination as to the meaning of this clause the court said, speaking through Mr. Justice Bradley:

"A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject Professor Greenleaf says: 'The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their mean-

ing, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.' 1 Greenl. Ev., sec. 277. Mr. Taylor uses language of similar purport. He says: 'Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible, of all the circumstances surrounding the author of the instrument.' Taylor, Ev., sec. 1082. Again he says: 'It may, and indeed it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it.' Taylor, Ev., sec. 1085.

"The principles announced in these quotations with the limitations and cautions with which they are accompanied, seem to us indisputable."

Speaking of the construction of an ambiguous clause in a grant, the Supreme Court said in

Cavazos v. Trevino, 73 U. S. 773; 18 L. ed. 813:

"In construing this grant, the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper, which were possessed by the actors themselves. The object and effect of such evidence are, not to con-

tradict or vary the terms of the instrument but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties.”

In a recent decision written by Chief Justice White, the Supreme Court affirmed a judgment of the Court of Claims against the United States.

United States v. R. P. Andrews & Co., 207 U. S. 229; 52 L. ed. 185.

The judgment was for the price of certain paper furnished by the plaintiff to the authorities in the Philippine Islands. The contract was in writing, but was ambiguous as to whether or not the United States or the Insular Government was the direct contracting party. In an extensive opinion Chief Justice White held that in view of all of the attendant circumstances, the negotiations for the contract, its execution and the subsequent conduct of the parties with respect to it, the Government of the United States was liable.

Plaintiffs in error stand first upon the ground that the language of the telegram of September 12, 1911, makes it an *express* offer to extend the charter as well as the option. If, however, it is held that the telegram is ambiguous and that therefore the court must look to the surrounding circumstances to determine which meaning was intended by the parties, there can be but one result.

The prior transactions—the circumstances leading up to the sending of the telegram—show that the extension of the charter was what was intended.

The Department had on hand a fund of \$20,000 legally available for the purchase outright of the "Homer". The price asked was \$45,000. The Department had on hand a further sum, which, though not available for the purchase, was available for the chartering of the vessel. We have quoted the letters in which Lembkey, writing for Bowers, the Commissioner of Fisheries, advised plaintiffs of these facts and further advised them of the scheme that the Department had in mind. That was to charter the "Homer" at the usual rate, to insert in the charter an option permitting the purchase during the charter and giving the Department the right to apply moneys due as hire upon the purchase price. It was the intention of the Commissioner, so writes Lembkey in the letter of December 15, 1909,

"to allow the charter money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for \$20,000, he would proceed to do so."

In the letter of December 2, 1910, Lembkey was even more specific. He says:

"If we were to charter the 'Homer' this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the purchase price."

On September 12, 1911, the Department was confronted with this situation. The "Homer" had earned approximately \$20,000 hire during the summer. This brought the Department within about \$5,000 of the pur-

chase price of the "Homer", less the \$20,000 fund which it had available. An extension of thirty days of the *charter* and the payment of an additional thirty-days' hire would enable the Government to exercise its option. If the charter were not extended the entire benefit of the \$20,000 paid as hire during the summer would be lost.

Under these circumstances—occurring identically as they had been outlined in Lembkey's letters—the telegram of September 12th was sent by the Department.

The contemporaneous understanding of everyone who had anything to do with the telegram was shown to be that it was intended to extend the charter. McKee and Fritch, who handled the transaction for plaintiffs in error, plainly believed it, and their good faith was not questioned (tr. pp. 49-50). That Lembkey, the Department's accredited agent on the Pacific Coast, believed it, is manifest from the endorsement which, on the 13th of September, he placed upon the duplicate of the charter in plaintiffs' possession. That endorsement read:

"According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Depart of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

"Subject to approval of Dept. of Commerce & Labor,

(Tr. p. 27.)

W. I. LEMBKEY,
Agent Seal Fisheries."

Moreover, Lembkey himself drafted the telegram to the Department in which on September 14, 1911, the Department was advised that the *charter* had been ex-

tended "as requested in your telegram of the twelfth instant" (tr. pp. 87, 88).

Finally, the subsequent actions of the Department establish complete acquiescence in the construction placed upon the telegram. As we have already pointed out this affords an independent ground for holding it bound by such construction. Its conduct, however, in remaining silent after being fully advised that plaintiffs considered the charter extended, furnishes additional evidence taken in conjunction with the events antecedent to, and contemporaneous with, the sending of the telegram, of the true meaning of that instrument.

In the entire record there is not one shred of evidence opposed to plaintiff in error's interpretation of this telegram. Not a single official went upon the stand to testify that it was the Department's intention to offer to extend the option alone. On the contrary, we find that Lembkey, the Department's own agent, placed himself irrevocably on record as entertaining the contrary view by endorsing an extension of the charter upon the duplicate held by plaintiffs. Nor is there a single fact shown in the record which can be said to indicate that an extension of the option alone was intended.

We submit, finally, that, if the telegram of September 12, 1911, was on its face susceptible to either of the two constructions, all of the facts which were shown as to the events which led up to it, which attended its sending and receipt, and which manifested the understanding of the parties, demonstrate conclusively that it was viewed and intended by both parties as an offer

to extend the charter. And there is not a shred of evidence, or a single fact, in the record, which supports a contrary view.

- (d) The same rules govern the construction of a contract between the United States Government and a private individual as one between two individuals.

In

United States v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194, 203,

Judge Pritchard said, speaking for the Fourth Circuit:

“In construing this contract we should treat it just the same as though it were a contract between individuals rather than an individual and the government as in this instance.”

Citing:

Smoots' Case, 15 Wall. 36; 21 L. Ed. 107,

where Mr. Justice Miller, speaking for the Supreme Court of the United States, said:

“There is, in a large class of cases coming before us from the Court of Claims, a constant and ever recurring attempt to apply to contracts made by the Government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals.

* * * * *

“In approaching the inquiry into the effect which the action of the Bureau of Cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the Government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear

that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand.”

In

S. H. Hawes & Co. v. Wm. R. Trigg Co., 65 S. E.
538, 549,

it was said:

“A contract between the United States government and a citizen or a corporation for the building of a boat or vessel for the use of the government or of any department thereof differs in no essential feature from a contract between two citizens, or between an individual citizen and a corporation. The rules of construction are the same in either case, and the contract is entered into subject to the principles referred to above.”

We have already noted that in specific instances the courts have applied, without abatement, the ordinary rules governing the construction of contracts to contracts of the various departments of the United States.

The trial court fell into error in departing from this rule. In deciding the case, the learned trial judge said:

“The COURT. * * * I do not think, Mr. Cassell, that the court would be justified in rendering a judgment *against the Government* on such uncertain evidence. There is room, however, for a different view, perhaps, *but it should be taken by an Appellate Court*. I think that, *sitting as a court of first instance*, I would not be justified in granting the relief asked in your second cause of action. You may have full findings and if the Circuit Court of Appeals takes a different view it would simply result in judgment going your way for the balance.

Judgment can go under the first cause of action for the amount due thereunder.” (Tr. p. 95.) (The italics are ours.)

It is submitted that measured by the ordinary rules which govern the contracts of individuals, the rights of plaintiffs in error are clear. That no different rule should be applied in favor of the Government is, it is submitted, a matter established both in reason and authority.

It is respectfully submitted that the portion of the judgment attacked by the writ of error should be reversed, and that the District Court should be directed to enter judgment in favor of plaintiffs in error for \$4488.75, the amount claimed in the second count of their complaint.

Dated, San Francisco,

March 13, 1916.

Respectfully submitted,

IRA A. CAMPBELL,

Attorney for Plaintiffs in Error.